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Supreme Court of the United States

OCTOBER TERM, 1936.

No. 440.

THE AMERICAN LIFE INSURANCE COMPANY, A CORPORATION, PETITIONER,

VS.

REESE SMITH STEWART, JUNIOR, AND ORA INEZ STEWART, AS EXECUTRIX OF THE ESTATE OF REESE SMITH STEWART, DECEASED, RESPONDENTS.

No. 441.

THE AMERICAN LIFE INSURANCE COMPANY, A CORPORATION, PETITIONER,

VS.

ORA INEZ STEWART AND ORA INEZ STEWART, AS EXECUTRIX OF THE ESTATE OF REESE SMITH STEWART, DECEASED, RESPONDENTS.

PETITION FOR WRITS OF CERTIORARI
and
BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRITS OF CERTIORARI.

May it please the Court: The petitioner, American Life Insurance Company, a corporation, respectfully shows to this Honorable Court:

A.

Summary of Matter Involved.

Two bills in equity were filed September 3, 1932 by petitioner, a Colorado corporation, against respondents, citizens of Kansas, to cancel two life insurance policies for $5000.00 each on the life of one Reese Smith Stewart, a citizen of Kansas, (R. 14). The policies were issued on February 23, 1932 (R. 10) on one application (R. 33, 60), and are identical except that respondent, Reese Smith Stewart, Junior, the insured's son, was named beneficiary in one, whereas respondent, Ora Inez Stewart, his wife, was named beneficiary in the other (R. 100). Insured was then 63 years old (R. 37). Insured died May 31, 1932 (R. 36). Petitioner duly tendered to respondents the premiums paid with interest and concurrently notified the beneficiaries that it elected to rescind and cancel the policies for fraud in the procurement (R. 8-24); and tender was refused (R. 8-24).

The grounds for cancellation alleged in the bills were concealment of material facts and fraudulent misrepresentations made by the insured in the application for the policies and also the presence in the policies of a clause providing that they would be incontestable

> "* * * after one year from its date of issue if the insured be then living, otherwise after two years from its date of issue." (R. 6).

The bills also alleged inadequacy of a remedy at law (R. 6, 14). September 26, 1932 respondents filed

motions to dismiss, alleging that the bills were without equity and that on the face of the bills petitioner had an adequate remedy at law. (R. 14). October 27, 1932 petitioner filed supplemental bills reciting that since the original bills were filed, and on October 11, 1932, respondents had filed law actions on the policies in the same court, and prayed that prosecution of such actions be restrained until the equity suits were finally determined. (R. 16, 20). July 28, 1933 the motions to dismiss the bills were overruled (R. 19). No hearing was had on the supplemental bills because counsel stipulated August 29, 1933 (R. 20), (approved by the court on August 31, 1933 (R. 20)) as follows:

> "That the suit in equity shall be tried to the court before said law action is tried, Provided, However, that the issues in said law action shall in the meantime be made up in order that said law issues thus joined shall stand ready for trial, with the understanding that said law issues, if any remain for trial, shall be tried as soon after the trial of the suit in equity as the court shall determine.
>
> "It is further agreed by the parties hereto that if this stipulation meets with the approval of the court, that a stipulation and agreement to the same effect shall be entered in said law action.
>
> "It is further agreed that if this stipulation does not receive the approval of the court, that then and in that event Complainant's application for an order restraining and enjoining further proceedings in said law action shall be presented to the court as soon as it will hear the same."

October 5, 1933 the court, counsel consenting, consolidated the equity suits for trial (R. 25). October

10, 1933 respondents filed amended answers (R. 23) admitting the formal jurisdictional averments; alleging that petitioner had waived the alleged misstatements in the application and that it was estopped from insisting that they were untrue. The answer contains no specific denial of the allegation in paragraph 8 of the bills (R. 6) of inadequacy of legal remedy, and contains no averment that petitioner had an inadequate legal remedy (R. 23-25); it did deny generally "each and every" allegation in the bill "not herein admitted, controverted or specifically denied" (R. 25) and the prayer in the answer is as follows (R. 25):

> "Wherefore, these defendants having fully answered to the said bill of complaint in so far as they are advised the same is material and necessary to be answered unto, deny that the said complainant is entitled to the relief, or any part thereof, in the said bill of complaint demanded, or any relief whatsoever, and pray to be hence dismissed with their reasonable charges in this behalf most wrongfully sustained."

January 3, 1934, *et seq.* the cases were tried (R. 27) pursuant to the written stipulation and without objection by respondents to equitable jurisdiction (R. 27). December 7, 1934 the court filed findings of fact (R. 32) and conclusions of law (R. 43) finding that the policies had been secured by fraud and should be cancelled and on the same day entered a joint decree cancelling the policies (R. 44) from which appeals were duly taken to the Circuit Court of Appeals for the Tenth Circuit. Stipulation for consolidated transcript was filed (R. 100). The cases were briefed

and argued as a single case (R. 1). On December 16, 1935 the Circuit Court of Appeals, without considering the merits, filed an opinion (per Phillips, Circuit Judge, (R. 107) reported in 80 Fed. (2d) 600), reversing the decrees and remanding the cases with instructions to dismiss the bills without prejudice to setting up the alleged fraud as a defense to the law actions (R. 107, 110). The court held that petitioner had an adequate remedy at law, that the answer challenged the court's equity jurisdiction and that this challenge was not waived by the stipulation above quoted. Petitioner duly filed petitions for rehearing and suggestions in support (R. 111). The court ordered oral argument on the petitions; this was had June 4, 1936 (R. 115). September 8, 1936 the Court of Appeals filed an opinion (R. 116) (per Lewis, Circuit Judge) and orders (R. 130), denying the petitions for rehearing. Judge Phillips dissented in a separate opinion (R. 122).

The issues herein presented are demonstrated by Judge Phillips' reasons for dissent. He stated that equity jurisdiction was determined by the facts existing "when the bills were filed," that jurisdiction was not lost "because an adequate remedy at law thereafter became available," that the incontestable clause, enabling a beneficiary to defeat the right to contest by delaying action, absenting himself, or otherwise preventing service, provided the requisite special circumstance to give equity jurisdiction to cancel if no law action was pending, and that "a remedy at law is inadequate, if it may be given or withheld at the will

of the opposing party." He further stated that the objection of adequacy of legal remedy was waived by failure to specifically plead it in the answer, pleading only to the merits, and stipulating for previous trial of the equity suits.

September 14, 1936 the Court of Appeals, upon application made therefor, ordered the mandates stayed for thirty days (R. 131-132).

B.

Questions Presented.

1. Where a fraudulently procured life insurance policy contains a two-year incontestable clause (which, concededly, under the law requires contest, if any, to be made by judicial proceeding within that period) and the insured dies within such period and no law action has been brought on the policy, may the insurer file a suit in equity to cancel the policy?

2. Conceding the right to file such a suit, where, after it is filed and during such contestable period, a law action is filed on the policy, is the insurer entitled to stay in equity and have the prior equity suit tried first, or must the equity suit be dismissed and insurer be relegated to its defense by answer in the subsequently filed law action?

3. In an equity suit to cancel a life insurance policy for fraud in the procurement, does the defendant waive the objection that plaintiff has an adequate remedy at law by failing to make such objection in his answer, by raising issues going only to the merits,

by not specifically denying in the answer the allegation in the petition that plaintiff has no adequate remedy at law, by stipulating in writing, approved by the court, that the equity suit shall be tried before trial is had in a subsequently instituted law action on the policy and by trying such suit as an equity suit without objection?

C.

Reasons Relied On for the Allowance of the Writs.

1. The decision of the Court of Appeals is in conflict with the following decisions of the Supreme Court:

Dawson, Attorney General, etc., et al. v. *Kentucky Distilleries and Warehouse Company,* 255 U. S. 288, 296.

Mutual Life Insurance Company v. *Hurni Packing Company,* 263 U. S. 167, 177.

Enelow v. *New York Life Insurance Company,* 293 U. S. 379, 384.

Duignan v. *U. S.,* 274 U. S. 195, 199.

American Mills Company v. *American Surety Company,* 260 U. S. 360, 363.

The Pusey & Jones Company v. *Hanssen,* 261 U. S. 491, 500.

2. The decision of the Court of Appeals is in conflict with the following decisions of other Circuit Courts of Appeals:

(Fourth Circuit)

Jefferson Standard Life Insurance Company v. *Keeton,* 292 F. 53, 54-56.

Jones v. *Reliance Life Insurance Company,* 11 F. (2d) 69, 70.

Brown v. *Pacific Mutual Life Insurance Company,* 62 F. (2d) 711, 712.

New York Life Insurance Company v. *Triesdale,* 79 F. (2d) 481, 485.

Pacific Mutual Life Insurance Company v. *Parker, et ux.,* 71 F. (2d) 872, 874.

(Fifth Circuit)

Jefferson Standard Life Insurance Company v. *McIntyre,* 294 Fed. 886, 888.

(Sixth Circuit)

New York Life Insurance Company v. *Seymour,* 45 F. (2d) 47, 48, 49.

Rose v. *Mutual Life Insurance Company of New York,* 19 F. (2d) 280, 282.

(Seventh Circuit)

Harnischfeger Sales Corporation v. *National Life Insurance Company,* 72 F. (2d) 921, 923.

(Eighth Circuit)

Peake v. *Lincoln National Life Insurance Company,* 15 F. (2d) 303, 305, 306.

Lincoln National Life Insurance Company v. *Hammer, et al.,* 41 F. (2d) 12, 17.

(Ninth Circuit)

Massachusetts Bonding and Insurance Company v. *Anderegg*, 83 F. (2d) 622, 624.

3. The decision of the Circuit Court of Appeals is in conflict with the weight of authority.

(See cases under 1 and 2.)

4. The Court of Appeals has misinterpreted and misapplied the decisions of this Court in *DiGiovanni* v. *Camden Fire Insurance Company*, 296 U. S. 64, and *Enelow* v. *New York Life Insurance Company*, 293 U. S. 379.

Wherefore, your petitioner respectfully prays that writs of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Tenth Circuit, commanding that court to certify and send to this court for its review and determination, on a day certain to be therein named, the full and complete transcript of the record and all proceedings in these cases numbered and entitled on its docket, numbers 1268 and 1269 in Equity, and entitled *Reese Smith Stewart, Junior, and Ora Inez Stewart, as Executrix of the Estate of Reese Smith Stewart, Deceased, appellants*, v. *The American Life Insurance Company, a corporation, appellee*, and *Ora Inez Stewart and Ora Inez Stewart, as Executrix of the Estate of Reese Smith Stewart, Deceased, appellants*, v. *The American Life Insurance Company, a corporation, appellee*, and that the judgment of the Tenth Circuit Court of Appeals may be reversed by this Honorable Court, and that your petitioner may

have such other and further relief in the premises as to this Honorable Court may seem meet and just and your petitioner will ever pray.

The American Life Insurance Company,
a Corporation, Petitioner,
By Earle W. Evans,
Joseph G. Carey and
Henry V. Gott,
of Wichita, Kansas,
Charles M. Blackmar,
William C. Michaels and
Kenneth E. Midgley,
of Kansas City, Missouri,
Counsel for Petitioner.

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BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI.

I.

OPINIONS BELOW.

The trial court filed no opinion; its separate findings of fact and conclusions of law appear at pp. 32-43 of the Record. The opinion of the Court of Appeals (R. 107)

is reported in 80 F. (2d) 600; the opinion of the court and the dissenting opinion of Judge Phillips on petition for rehearing are not yet reported but appear in the record at pages 116 to 130.

II.

JURISDICTION.

(1) The jurisdiction of this court is invoked under Section 240(a) of the Judicial Code as amended by Act of February 13, 1925, being now Section 347, Title 28, U. S. C. A. page 359.

Ex parte Lau Ow Bew, 141 U. S. 583.

(2) The date of the judgment in the trial court is December 7, 1934 (R. 44). Appeals were duly perfected and the decrees of the Circuit Court of Appeals were entered December 16, 1935 (R. 110-111). Petitions for rehearing were filed January 13, 1936 (R. 115), argued June 4, 1936 (R. 115) and denied September 8, 1936 (R. 130). Thirty days stay of mandate was granted September 14, 1936 (R. 131).

III.

STATEMENT OF THE CASE.

Under the heading, A, in the petition, *ante*, pp. 2-6, is a full statement of the case so far as material to the consideration of the questions presented, and, in the interest of brevity, the statement is not here repeated.

IV.

SPECIFICATION OF ERRORS.

The Court of Appeals for the Tenth Circuit erred:

1. In holding that the bills of complaint did not state facts entitling plaintiff to equitable relief (cancellation of insurance policies) and ordering a dismissal of the bills.

2. In holding that respondent's answers raised the question of adequacy of legal remedy.

3. In holding that the after filed law actions ousted equity of its jurisdiction.

4. In holding that the stipulation, approved by the trial court, that the equity suits should be tried in advance of the law actions, was not a waiver of any objection to the equity jurisdiction on the ground that petitioner had an adequate remedy at law.

V.

SUMMARY OF ARGUMENT.

POINT A.

(Specification 1.)

The bills stated good cases in equity. Cancellation of instruments procured by fraud is a well settled field of equity jurisdiction. The incontestable clause required contest in court to preserve petitioner's rights, and no law action was pending at the time the bills were filed in which contest could be made by answer. These facts pre-

sented a "special circumstance" authorizing petitioner to bring its bills to cancel when and as the bills were filed.

Mutual Life Insurance Company v. *Hurni Packing Company*, 263 U. S. 167, 174, 176.

Story Eq. Juris. (13th Ed.) Sec. 995.

POINT B.

(Specification 3.)

Since petitioner was well lodged in equity by filing the bills September 3, 1932, the equity cases had the right of way, and were properly tried first even though on October 11, 1932 law actions were brought on the policies. And hereunder:

(1)

When a court of equity properly acquires jurisdiction it retains it until complete justice is done between the parties. Whether the equity court has jurisdiction depends on the facts and circumstances existing at the time the bill is filed, not by those that may subsequently develop.

Bank of Kentucky v. *Stone, et al.*, 88 Fed. 383, 391.

Dawson, Attorney General, etc., et al. v. *Kentucky Distilleries & Warehouse Company*, 255 U. S. 288, 296.

10 Ruling Case Law Sec. 120.

(2)

The case is controlled by the rule announced by this court in *Dawson, Attorney General, etc., et al.* v. *Kentucky Distilleries & Warehouse Company*, 255 U. S. 288, 296, that equitable jurisdiction is not "lost because since

the filing of the bill an adequate legal remedy may have become available."

(3)

The decision of the Circuit Court of Appeals is on these points in conflict with decisions in other circuits in analogous cases; indeed, it is in conflict with *Enelow* v. *New York Life Insurance Company*, 293 U. S. 379, 384, on which it purports to be based.

See cases cited under C2 of the petition, *supra*, pages 7-9.

POINT C.

(Specifications 2 and 4.)

Section 384, 28 U. S. C. A., providing that no equity suit shall be maintained if plaintiff has an adequate remedy at law, may be waived by defendant, and was waived in these cases both by pleading to the merits only, by stipulating in writing for trial of the equity suits in advance of the law actions and by proceeding to trial without objecting to equity jurisdiction.

American Mills Company v. *American Surety Company*, 260 U. S. 360, 363.
Duignan v. *U. S.*, 274 U. S. 195, 199.
Twist v. *Prairie Oil Co.*, 274 U. S. 684, 689-691.
Perego v. *Dodge*, 163 U. S. 160, 164.
Reynes v. *Dumont*, 130 U. S. 354, 395.
Kilbourn v. *Sunderland*, 130 U. S. 505, 514.
Tyler v. *Savage*, 143 U. S. 79, 96-97.
Southern P. R. R. Co. v. *U. S.*, 200 U. S. 341, 349.
Brown v. *Lake Superior Iron Co.*, 134 U. S. 530, 536.
Singer Sewing Machine Co. v. *Benedict*, 229 U. S. 481, 484.
Lyons Milling Co. v. *Goffe & Carkener*, (C. C. A. 10) 46 F. (2d) 241, 245.

VI.

ARGUMENT.

POINT A.

(Specification 1.)

The Bills State Good Causes of Action in Equity.

Unquestionably the bills alleged facts showing fraud in the procurement of the policies. The incontestable clause was pleaded and the bills alleged:

> "8. • • • That by the foregoing provisions said policy is incontestable after two years from its date of issue; that by reason of said provision said policy of insurance must be contested by this complainant on or before the expiration of the said period of contestability, notwithstanding the intervening death of the insured; that the defendant herein, the beneficiary under said policy, may delay the commencement of an action at law for the enforcement and collection of said policy until after the expiration of said contestable period or, if action is instituted, may dismiss the same after the expiration of said two-year period, so as to prevent this complainant from defending its liability under the policy on the ground of misrepresentation and fraud, as has been above set out, and this complainant is without adequate remedy at law in the premises and the only protection it has against the effects of said misrepresentation and fraud is in a court of equity."

The bills further pleaded tender of return of premiums, refusal of the tender, and a renewal of tender in the bills. The prayer was for cancellation and general relief. This Court held in *Mutual Life Insurance Com-*

pany v. *Hurni Packing Company*, 263 U. S. 167, 174, 176, that where a policy contains such an incontestable clause as is here involved, its benefits inure to the beneficiary in the event of the death of the insured within the limited period, and that unless the policy is contested by the insurer within the period stipulated, all defenses, including fraud, are barred. It is the settled rule in the national courts and many state courts that "contest" means "contest in court," either by a bill in equity or by answer filed in a law action. See cases cited *supra*, pages 7-9, also in Judge Phillips' dissenting opinion (R. 124, 125). Many of such cases expressly point out that the presence of such a clause provides that "special circumstance" which was wanting in *Insurance Company* v. *Bailey*, 80 U. S. (13 Wall.) 616, and *Cable* v. *U. S. Life Ins. Co.*, 191 U. S. 288, neither of which cases involved a policy containing such a clause. This is necessarily so, since such clause will result in loss of defenses long prior to the time when a claim on the policy will be barred by running of statutory limitations. The right to sue in equity to cancel if no law action is pending must be recognized, otherwise a beneficiary can effectuate insured's fraud by going into another jurisdiction (*Peake* v. *Lincoln National Life Insurance Company*, 15 Fed. (2d) 303, 306, C. C. A. 8), or disappearing or going abroad, (*New York Life* v. *Panagiotopolas*, 80 Fed. (2d) 136, 137, C. C. A. 1) and by delaying suit at law until the contestable period expires. Death of the beneficiary may also prevent contest if the insurer must await the near expiry of the period of contest before proceeding in equity. Further, the doctrine of "you must delay

your equity suit until just before the contestable period expires and hope that the beneficiary will be then living and locatable for suit" invites laches and delay which equity has traditionally abhorred. It makes a dead letter of the ancient maxim "*Vigilantibus et non dormientibus jura subveniunt.*" Petitioner had the right to go into equity when it did. No law action was then pending or threatened. The bills stated good cases in equity.

POINT B.

(Specification 3.)

Plaintiff Was Entitled to Stay in Equity and to Have Its Suits First Tried Even Though Law Actions Thereafter Were Brought on the Policies.

The opinion of the Court of Appeals on this point is in direct conflict with decisions in other circuits where the question has been presented, and with the weight of authority. (See cases cited, *supra,* pp. 7-9.) Being well lodged in equity, plaintiff was entitled to stay there. Justice Harlan on the circuit (Judges Taft and Lurton concurring) held in *Bank of Kentucky* v. *Stone,* 88 Fed. 383, 391:

> "However this may be, it would seem clear that a court of equity will not withhold relief from a suitor merely because he may have an adequate remedy at law if his adversary chooses to give it to him. The remedy at law cannot be adequate if its adequacy depends upon the will of the opposing party. To refuse relief in equity upon the ground that there is a remedy at law, it must appear that the remedy at law is 'as practical and efficient to the ends of justice and its prompt administration as the remedy in equity.'"

This Court in *Dawson, Attorney General, etc., et al.* v. *Kentucky Distilleries*, 255 U. S. 288, 296, definitely answered the question in the following language:

> "Nor is the equitable jurisdiction lost because since the filing of the bill an adequate legal remedy may have become available."

The decision of the Circuit Court of Appeals is in direct conflict with this principle.

This Court in *Enelow* v. *New York Life Insurance Company*, 293 U. S. 379, 384, ruled that an equitable counterclaim would not lie in a law action by a beneficiary, but expressly distinguished and (it would appear) thereby tacitly approved the doctrine of those cases in other circuits opposed to the opinion. This court there said:

> "Nor is it a case where, although death may have occurred, action has not been brought to recover upon the policy, and equitable relief is sought to protect the insurer against loss of its defense by the expiration of the period after which the policy by its terms is to become incontestable."

It is apparent that the opinion misapplies and erroneously interprets the *Enelow* case. The same conclusion follows as to *DiGiovanni* v. *Camden Fire Insurance Association*, 296 U. S. 64. That case involved a fire insurance policy, there was no incontestable clause, and the bills pleaded expressly that law actions were about to be filed. The situation was in no way analogous: See Judge Phillips' dissenting opinion, (R. 127).

POINT C.

(Specifications 2 and 4.)

Respondents, by Answering to the Merits Only, by Not Specifically Denying Inadequacy of Legal Remedy, and by Stipulating for Trial of the Equity Cases First and Proceeding to Trial in Equity Without Any Objection, Waived Any Objection That Petitioner Had an Adequate Remedy At Law.

The district court had jurisdiction of the parties and the subject matter, the bills presented cases properly within the field of general equity jurisdiction (cancellation of instruments for fraud), motions to dismiss were overruled, and the answers filed neither specifically denied inadequacy (Equity Rule 30), nor affirmatively alleged adequacy of the legal remedy. Further, respondents expressly stipulated, with approval of the district court, for trial of the equity suits first. The objection that there is an adequate legal remedy, in a case properly within the general field of equity jurisdiction, is not an objection to the power or ultimate jurisdiction of the court to hear and decide the case. Such objection may be waived by defendant, even in a case where the remedy at law is admittedly adequate (which is not so here). *American Mills Company* v. *American Surety Company*, 260 U. S. 360, 363. In these cases not only was there a total absence of *any* remedy at law when the bills were filed, but it would be impossible to conceive of a stronger case of waiver —an express declaration filed in the cause and approved by all parties and the court that the equity suits were to be tried first. Under the decisions of

this court, this left no question in the case of adequacy of legal remedy.

(See cases cited under Summary of Argument, Point "C," *supra,* page 15.)

VII.

CONCLUSION.

The importance of this case cannot be overstated. Practically all life insurance policies now issued contain an incontestable clause, and in many states are required by statute to contain such a clause. A number of companies (R. 116) were permitted to file briefs and orally argue, *amici,* in support of the motions for rehearing. If the decision stands, then at least in the Tenth Circuit, beneficiaries of policies secured by fraud will be encouraged to attempt to effectuate the fraud by delaying suit, with the hope that insurer's defense will be barred by the contestable clause, well knowing that if the company moves to protect its rights by equity suit, the dismissal of such suit can be secured by merely filing a law action. We do not believe the courts should thus tolerate circuity of action, encourage delay and penalize vigilance. And certainly, the rights of an insurer in this respect should not vary with the circuit in which fraud is perpetrated upon it.

We respectfully pray that the petition for writs of certiorari be granted to the Tenth Circuit Court of Appeals in these cases.

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